

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHERN CALIFORNIA RIVER WATCH,  
a non-profit corporation; No. C 10-03912 CW  
TEAMSTERS LOCAL 70, a labor  
organization; and EAST BAY  
ALLIANCE FOR SUSTAINABLE ECONOMY,  
a non-profit organization, ORDER DENYING  
Defendants' Motion  
to Dismiss  
(Docket No. 13)

Plaintiffs,

v.

OAKLAND MARITIME SUPPORT  
SERVICES, INC., a corporation;  
WILLIAM ABOUDI, an individual;  
and JORGE GONZALEZ RIVERA d.b.a.  
CHRISTIAN BROTHERS TRUCK  
SERVICES, an individual; CITY OF  
OAKLAND, a municipality;  
REDEVELOPMENT AGENCY OF THE CITY  
OF OAKLAND, a local public  
agency; and COMMUNITY AND  
ECONOMIC DEVELOPMENT AGENCY, a  
public agency,

Defendants.

Plaintiffs Northern California River Watch, Teamsters Local  
70, and East Bay Alliance for a Sustainable Economy have brought  
suit against Defendants, alleging violations of the Clean Water  
Act, 33 U.S.C. § 1365. Defendants Oakland Maritime Support

1 Services, Inc. (OMSS) and William Aboudi (Moving Defendants) move  
2 to dismiss the suit against them under Federal Rules of Civil  
3 Procedure Rules 12(b)(1) and 12(b)(6).<sup>1</sup> Docket No. 13. Having  
4 considered all of the parties' submissions, the Court denies  
5 Moving Defendants' motion to dismiss.

6  
7 BACKGROUND

8 The Clean Water Act prohibits discharge of pollutants into  
9 navigable waterways except as authorized by the statute. San  
10 Francisco BayKeeper, Inc. v. Tosco Corp., 309 F.3d 1153, 1156  
11 (2002). The Act is largely administered through the National  
12 Pollution Discharge Elimination System (NPDES) permit program,  
13 under which states are authorized to issue and administer NPDES  
14 permits. Id.; 33 U.S.C. § 1342(b).

15 Plaintiffs' First Amended Complaint alleges the following.  
16 Plaintiffs are two California non-profit organizations and a local  
17 labor union, whose members live in the San Francisco Bay area and  
18 enjoy and use the waters impacted by the alleged violations. OMSS  
19 is a California corporation that operates and controls a maritime  
20 transportation support facility located at the northern end of the  
21 Port of Oakland Harbor Facilities. The OMSS facility covers over  
22 700,000 square feet, and is the site of the claimed violations.

23 OMSS leases the property from the Redevelopment Agency, and  
24 Defendant Jorge Gonzalez, doing business as Christian Brothers

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27 <sup>1</sup> No proof of service on the other Defendants has been filed.  
28 The deadline for serving them is March 2, 2011.

1       Truck Services, is engaged in truck repair and maintenance  
2 services at that location. The Community and Economic Development  
3 Agency (CEDA) implements projects and programs in the ten areas  
4 managed by the Redevelopment Agency. CEDA staff members oversee  
5 the day-to-day management of the properties owned and leased by  
6 the Redevelopment Agency, including the OMSS facility.

7           OMSS began operating its facility on or about August 7, 2006.  
8 The facility consists of several buildings, and a yard with paved  
9 areas. It is within a few hundred feet of the San Francisco Bay.  
10 Industrial activities at the facility allegedly include, but are  
11 not limited to, the storage of truck tractors, containers and  
12 trailers; truck repair and maintenance; tire, container and  
13 trailer repair; and fueling services. As a result of these  
14 activities, the substantial industrial machinery and heavy  
15 equipment stored at the facility, and the lack of a cover over the  
16 property, oil, grease, rinse water, engine coolant, solvents,  
17 fuels and various other pollutants are exposed to rainfall and  
18 flow unobstructed to storm drains located throughout the facility.  
19 In addition, Plaintiffs contend that facility users frequently  
20 urinate on the ground, and urine and nitrates are carried by storm  
21 water into the drains as well.

22           Plaintiffs assert that polluted storm water and non-storm  
23 water from the OMSS facility enters up to two dozen storm drains  
24 on or adjacent to the property and discharges directly into the  
25 Bay in violation of the Clean Water Act. Plaintiffs further

allege that Defendants have failed to comply with a host of permitting, monitoring, and reporting requirements under the Act.

## LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case. Federal subject matter jurisdiction must exist at the time the action is commenced. Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). "In support of a motion to dismiss under Rule 12(b)(1), the moving party may submit affidavits or any other evidence properly before the court . . . . It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." Colwell v. Dept. of Health and Human

1       Services, 558 F.3d 1112, 1121 (9th Cir. 2009) (internal citations  
2 omitted); Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039  
3 n.2 (9th Cir. 2003). The court enjoys broad authority to order  
4 discovery, consider extrinsic evidence, and hold evidentiary  
5 hearings in order to determine its own jurisdiction. Rosales v.  
6 United States, 824 F.2d 799, 803 (9th Cir. 1987).

7              Dismissal under Rule 12(b)(6) for failure to state a claim is  
8 appropriate only when the complaint does not give the defendant  
9 fair notice of a legally cognizable claim and the grounds on which  
10 it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).  
11 A complaint must contain a "short and plain statement of the claim  
12 showing that the pleader is entitled to relief." Fed. R. Civ. P.  
13 8(a).

14              In considering whether the complaint is sufficient to state a  
15 claim, the court will take all material allegations as true and  
16 construe them in the light most favorable to the plaintiff. NL  
17 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
18 However, this principle is inapplicable to legal conclusions;  
19 "threadbare recitals of the elements of a cause of action,  
20 supported by mere conclusory statements," are not taken as true.  
21 Ashcroft v. Iqbal, \_\_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009)  
22 (citing Twombly, 550 U.S. at 555).  
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#### DISCUSSION

24              Moving Defendants argue that Plaintiffs' notice letters,  
25 which are attached to Plaintiffs' First Amended Complaint, are  
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1 insufficient to support the Court's subject matter jurisdiction to  
2 hear Plaintiffs' claims under the Clean Water Act. Title 33  
3 U.S.C. § 1365(a) states that

4 any citizen may commence a civil action on his own  
5 behalf--(1) against any person . . . who is alleged to  
6 be in violation of (A) an effluent standard or  
7 limitation under this chapter or (B) an order issued  
by the Administrator or a State with respect to such a  
standard or limitation[.]

8 In turn, 33 U.S.C. § 1365(b) requires the plaintiff to give notice  
9 of the alleged violation to any alleged violator of the standard,  
10 limitation, or order, at least sixty days prior to commencement of  
such a citizen's action. Section 1365(b) further states, "Notice  
12 under this subsection shall be given in such a manner as the  
13 Administrator shall prescribe by regulation."

15 The prescribed regulation, 40 C.F.R. § 135.3(a) provides,

16 Notice regarding an alleged violation of an effluent  
17 standard or limitation or of an order with respect  
thereto, shall include sufficient information to  
18 permit the recipient to identify the specific  
standard, limitation, or order alleged to have been  
19 violated, the activity alleged to constitute a  
violation, the person or persons responsible for the  
20 alleged violation, the location of the alleged  
violation, the date or dates of such violation, and  
the full name, address, and telephone number of the  
22 person giving notice.

23 The Supreme Court has required the strict application of the  
24 notice requirements under this provision. Hallstrom v. Tillamook  
25 County, 493 U.S. 20, 26-29 (1989) ("[T]he legislative history  
26 indicates an intent to strike a balance between encouraging  
27 citizen enforcement of environmental regulations and avoiding  
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1       burdening the federal courts with excessive numbers of citizen  
2       suits." )

3       Plaintiffs filed suit on August 31, 2010. Their original  
4       complaint attached a Section 1365 notice letter dated February 17,  
5       2010. Subsequently, Plaintiffs filed their First Amended  
6       Complaint, which included the February 17, 2010 notice letter, and  
7       another notice letter dated September 2, 2010. FAC, Exs. A & B.  
8       The September 2, 2010 notice letter generally mirrors the content  
9       of the earlier notice letter, except that it names, in addition to  
10      Aboudi, Defendant City of Oakland, Defendant agencies and their  
11      presiding officials, and it omits certain businesses and their  
12      owners named in the previous notice letter.

13      I. Aboudi's Individual Liability

14      The first defect Moving Defendants assert is the purported  
15      failure to address Aboudi as an individual. Because the letters  
16      refer to Aboudi in his official capacity as president and a  
17      registered agent for OMSS, Moving Defendants contend that Aboudi  
18      was not properly notified as an individual. Both letters clearly  
19      identify Aboudi, repeating his name three times on the first page  
20      in relation to three separate addresses. The first and fourth  
21      paragraphs in the February 17, 2010 letter give notice to Aboudi  
22      as an owner, officer or operator responsible for the alleged  
23      violations at the OMSS facility. Likewise, the first and fourth  
24      paragraphs in the September 2, 2010 letter identify and notify  
25      Aboudi as a person responsible for the violations. Section V in  
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both letters names Aboudi as a person responsible for the alleged violations, stating, "River Watch puts . . . William Aboudi [and others]. . . on notice that they are the persons responsible for the violations described above." Title 40 C.F.R. § 135.5(a) simply requires "sufficient information to permit the recipient to identify . . . the person or persons responsible for the alleged violation."

Moving Defendants argue that the allegations are insufficient to pierce the corporate veil, and therefore the Court may not exercise jurisdiction over Aboudi personally. This argument, however, fails to recognize that, under the Clean Water Act, penalties may be imposed against individuals who are in positions of authority at polluting companies. Humboldt Baykeeper v. Simpson Timber Co., 2006 U.S. Dist. LEXIS 91667, at \*9-10 (N.D. Cal.) (citing 33 U.S.C. §§ 1319(c)(2),(6)) (imposing liability on "any person who . . . knowingly violates" the Clean Water Act including "any responsible corporate officer."); see United States v. Iverson, 162 F.3d 1015, 1022-26 (9th Cir. 1998) ("Under the CWA, a person is a 'responsible corporate officer' if the person has authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.").

Moving Defendants further contend that Plaintiffs have failed to state a claim under Rule 12(b)(6) because the allegations are

1 insufficient to establish Aboudi's individual liability on an  
2 alter ego theory. For the reasons explained above, it is  
3 unnecessary for Plaintiffs to demonstrate a unity of interest  
4 between OMSS and Aboudi to state a claim against him as an  
5 individual.

6 II. Notice of Dates

7 Moving Defendants assert a second defect in the allegations.  
8 They contend that the Court lacks subject matter jurisdiction over  
9 Plaintiffs' claims due to inadequate notice in the First Amended  
10 Complaint and the notice letters of the dates of the alleged  
11 violations.

12 Moving Defendants rely heavily on Washington Trout v. McCain  
13 Foods, Inc., where the plaintiffs' notice did not identify  
14 specific dates of the purported violations, but alleged that  
15 "[t]his pollution is substantial, longstanding, continuing, and  
16 unpermitted by the NPDES." 45 F.3d 1351, 1352 (9th Cir. 1995).  
17 The Ninth Circuit did not reach the issue of whether the notice  
18 letter adequately informed the alleged polluters of the violation  
19 dates. Id. at 1352 n.2 ("Plaintiffs argue that by stating in  
20 their notice that the 'pollution is substantial, longstanding, and  
21 continuing' they have complied with the regulation's requirement  
22 of specifying the dates of the violation. Because of our  
23 resolution of the case on other grounds, we need not reach this  
24 issue."). Instead, the court found inadequate notice because the  
25 letter failed to give the identity and contact information of the  
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1 plaintiffs. Thus, the case does not stand for the proposition  
2 that notice of dates more specific than that given in Trout is  
3 mandatory under 33 U.S.C. § 1365(b) and 40 C.F.R. § 135.3(a).

4 There are eight causes of action in Plaintiffs' First Amended  
5 Complaint, and Plaintiffs have given sufficient notice of the  
6 dates of the alleged violations in all of them. The notice  
7 regulation does not require plaintiffs to "'list every specific  
8 aspect or detail of every alleged violation.'" San Francisco  
9 BayKeeper, 309 F.3d at 1158 (citing Community Ass'n for  
10 Restoration of the Environment v. Henry Bosma Dairy, 305 F.3d 943,  
11 949 (9th Cir. 2002)). "Notice is sufficient if it is reasonably  
12 specific and if it gives 'the accused company the opportunity to  
13 correct the problem.'" Waterkeepers Northern California v. AG  
14 Industrial Mfg., Inc., 375 F.3d 913, 917 (9th Cir. 2004) (citing  
15 San Francisco BayKeeper, 309 F.3d at 1158).  
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17 Plaintiffs have alleged and given notice of the following  
18 "continuous" and "ongoing" violations from the date OMSS began  
19 operating the facility, on or about August 7, 2006: (1) failure to  
20 secure a NPEDS permit prior to discharging pollutants into waters  
21 of the United States (First and Second Causes of Action);  
22 (2) failure to develop and implement a Storm Water Pollution  
23 Prevention Plan (Fifth Cause of Action); (3) failure to collect  
24 and analyze storm water samples (Sixth Cause of Action);  
25 (4) failure to submit timely Annual Reports and reports of non-  
26 compliance with the General Industrial Storm Water Permit to the  
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1 San Francisco Bay Regional Water Quality Board (Seventh Cause of  
2 Action); and (5) failure to implement the best technology  
3 available that is economically achievable (BAT) and the best  
4 conventional pollutant control technology (BCT) (Eighth Cause of  
5 Action). More specific dates are not required for these  
6 particular allegations. San Francisco BayKeeper, 309 F.3d at 1158  
7 ("Where BayKeeper alleged an ongoing violation of Tosco's  
8 obligation to implement best available technology to prevent storm  
9 water pollution, no specific dates were needed." ).  
10

11 The Third Cause of Action alleges the unlawful discharge of  
12 storm waters containing pollutants into the Bay. The notice  
13 letters assert that the violations:

14 have occurred and will occur on every significant rain  
15 event that has occurred since at least August 7, 2006  
16 or any earlier date by which OMSS began operating the  
17 facility . . . Exhibit A, attached hereto, sets forth  
18 specific rain dates on which [the complaining parties  
allege] that OMSS has discharged storm water  
containing pollutants in violation of the Act . . .

19 Both notice letters attach lists specifying rain dates at the Port  
20 of Oakland in Oakland, California. The information compares  
21 favorably with the rainfall tables that the Ninth Circuit accepted  
22 in Waterkeepers, 375 F.3d at 917-18 (reversing district court  
23 decision that rainfall tables did not provide adequate notice of  
24 dates of the alleged violations). When the relevant sentences are  
25 read as a whole, and with Exhibit A, Moving Defendants'  
26 objections, parsing the words "significant rain event" compared to  
27 "rain event," are not reason to find that notice was inadequate.  
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1       The large number of dates simply indicates many rain dates when  
2       the violations are alleged to have occurred.

3           Plaintiffs' Fourth Cause of Action alleges unlawful  
4       discharges of polluted non-storm waters into the San Francisco  
5       Bay. The notices indicate that the violations occurred "on each  
6       date on which the facility has discharged non-storm water  
7       including fuel, oil and grease, rinse water, wash water, urine, or  
8       other wastes to the storm drains at the facility." Plaintiffs  
9       allege that these discharges have been ongoing since Moving  
10      Defendants began operating the facility. No specific dates are  
11      identified. Notice in this manner is reasonably specific because  
12      the alleged violations are clearly identified, providing Moving  
13      Defendants with an opportunity to fix the problem, if one exists.

14           The Ninth Circuit decision in San Francisco BayKeeper guides  
15      this result. There the plaintiff alleged that the defendants  
16      illegally discharged petroleum coke into a slough by storing large  
17      uncovered piles of the pollutant at a particular facility, a  
18      method of storage that allowed coke to be carried into the slough  
19      by wind and rain. 309 F.3d at 1155-56. The plaintiff further  
20      alleged that the defendants' careless loading methods caused coke  
21      to spill into the slough. The plaintiff provided a few specific  
22      dates when alleged spillage occurred, based on records of when  
23      ships were loading, and provided no exact dates for when the coke  
24      blew or flowed into the slough. Nevertheless, the court found  
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1 that there was adequate notice of the dates in relation to both  
2 sets of allegations. The court explained that

3 the key language in the notice regulation is the  
4 phrase "sufficient information to permit the recipient  
5 to identify" the alleged violations and bring itself  
6 into compliance. Notice is sufficient if it is  
specific enough "to give the accused company the  
opportunity to correct the problem."

7 Id. at 1158 (internal citations omitted). Here, the notice  
8 letters were specific enough to inform Moving Defendants of the  
9 nature of the alleged violations, as well as the dates when those  
10 violations likely occurred. Moving Defendants are in a position  
11 to know when non-storm waters were discharged, if at all, into the  
12 storm drains because they operate the facility, and, presumably,  
13 are aware of and in communication with all of the businesses and  
14 individuals using the facility.  
15

#### CONCLUSION

17 Because the Court finds that notice was sufficient to inform  
18 Aboudi of his individual liability, and to state the dates of the  
19 alleged violations, the Court denies Moving Defendants' motion to  
20 dismiss. Docket No. 13.  
21

22 IT IS SO ORDERED.  
23

24 Dated: 2/14/2011

  
CLAUDIA WILKEN  
United States District Judge